IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 462 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

MUKUNDBHAI L BHATT SELLER

Appearance:

1. Criminal Appeal No. 462 of 2000

MS NV JOSHI, APP for Petitioner No. 1

MR BC DAVE for Respondent No. 1

NOTICE SERVED for Respondent No. 1,3

..... for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 21/03/2003

ORAL JUDGEMENT

The State of Gujarat has preferred this appeal

under Section 378 of the Code of Criminal Procedure, 1973 (for short, "the Code") challenging the judgment and discharge order, recorded on 19/07/99 by the learned J.M.F.C. at Jamkhambhaliya, in Criminal Case No. 816 of 1995, under which the learned trial Magistrate discharged the present respondents from offences punishable under Section 16, read with Sections 2 and 7 of the Prevention of Food Adulteration Act, 1954.

2. The case of the original complainant before the trial court was that one Mr.A B Mogul was a duly appointed Food Inspector and he visited the lodge of the respondents on 04/10/94. That, he introduced himself and also explained to the respondents that he wanted to take a sample of buffalo milk. After following due procedure of law and after issuing notice, the said Food Inspector purchased milk sample. It was divided into three parts and then, one of the parts was sent to the Public Analyst for analysis. Report was received, stating that the said milk was adulterated. Consent was obtained and thereafter, complaint was filed against the respondents for the aforesaid offence.

3. The complaint was registered and the respondents appeared before the trial court. This being a warrant triable complaint, the learned Magistrate proceeded to record evidence of the original complainant, in order to ascertain as to whether there was a case for framing charge against the present respondents. The prosecution examined the Food Inspector, who was then in office, at the time when the evidence was recorded. It was noticed that the original Food Inspector, Mr. A B Mogul, had passed away and therefore, naturally, he could not be examined. No other witness was examined and after hearing the arguments, the learned Magistrate found that the case was not made out to frame charge against the respondents and therefore, the learned Magistrate by the aforesaid judgment and order, directed discharge of the present respondents.

4. Instead of filing Criminal Revision Application under Section 397, read with Section 401 of the said Code, the State has preferred Criminal Appeal, against the aforesaid judgment and order of discharge under Section 245 of the said Code.

5. It has been contended here that there was sufficient material before the trial court which has been ignored by the said court and therefore, there is patent illegality in discharging the present respondents. That, therefore, the judgment and discharge order of the trial

court are illegal and perverse and deserve to be set aside. That, therefore, the present appeal be allowed and the respondents be convicted for the aforesaid offences. Rule was issued and in response to the service of notice of Rule, Mr.B C Dave learned advocate appeared for respondent nos. 1 and 3 whereas respondent no. 2, Mr.L H Bhatt has passed away.

6. I have heard Ms.N V Joshi, learned APP for the State and Mr.B C Dave, learned advocate for respondent nos. 1 and 3. I have also gone through the papers and the learned advocates have also taken me through the evidence on record.

7. It was the case of the late Food Inspector before the trial court that buffalo milk sample was purchased by him from the present respondents and it was found to be adulterated.

8. Indisputably, the original Food Inspector who had taken the sample, namely Mr.A B Mogul, had passed away before his evidence could be recorded. Therefore, his successor in office, had tendered evidence before the trial court. Naturally, the witness was the successor in office of the Food Inspector, who was not a witness, when the process of taking sample was undertaken. Therefore, the said witness Arunkumar Becharbhai, Ex.24 could not give any evidence about the actual process undertaken by late Mr.A B Mogul, while taking sample of buffalo milk from the respondents. No other witness has been examined by the complainant before the trial court.

9. Now, it is not much in dispute that there are certain mandatory provisions which are required to be followed by the Food Inspector, at the time of collection of food sample. Section 11 of the Prevention of Food Adulteration Act, 1954 (for short, "the Act") clearly mentions the procedure to be followed by a Food Inspector for collection of food sample. Subclause (b) of Clause (1) of Section 11 of the said Act, clearly shows that a Food Inspector is required to divide the sample into three parts and mark and seal or fasten up each of them in such a manner as its nature permits and take the signature or thumb impression of the person from whom the sample has been taken, in such place and in such manner as may be prescribed. Since, the Food Inspector had passed away and since the witness, Arumkumar Becharbhai was not a witness to the fact situation, the evidence is lacking on the point as to whether the sample was collected by late Mr.A B Mogul, in the manner described and prescribed as aforesaid.

10. Subclause (c) further requires that one part of the sample is required to be sent for analysis to the Public Analyst and the remaining two parts are required to be sent to the Local Health Authority. Again, there is no material on record to prove that this aspect was followed by Late Mr.A B Mogul.

11. Then, we can also turn to Rule 9 of the Prevention of Food Adulteration Rules, 1955 (for short, "the Rules"). Rule 9 provides with the duties of a Food Inspector. Rule 15 provides for the procedure to be followed for the labelling and addressing of the bottles or containers. Rule 16 provides for the manner of packing and sealing of the samples. Rule 17 provides for the manner of despatching the containers of samples. Since the Food Inspector who had collected the sample had passed away and since there is no further material produced on record before the trial court, it is not ascertainable, if the above procedure prescribed by the "Rules" was followed by Late Mr.A B Mogul. It is also required to be seen that the sample is required to be collected in a clean and dry vessel. It is also required to be seen that preservative is required to be added for due preservation of the sample. In the present case, we find that the evidence is lacking on the aforesaid material aspects also. In other words, it is not on record as to whether the sample was collected as aforesaid and whether the sample was actually taken in a clean and a dry vessel. It is also not on record as to whether preservative namely "Formalin" was added to the said sample. In other words, it is not on record as to whether the above said mandatory provisions were followed by the concerned Food Inspector, at the relevant point of time.

12. At the cost of repetition, it may be stated again that the Food Inspector who had given evidence before the trial court was not present when the sample was collected. The Peon or the Panch who may have been present there has not been examined and therefore, there is only a solitary evidence on record and that is the evidence of the present Food Inspector who has no idea, as to what procedure was followed by the Late Food Inspector, Mr.A B Mogul. In other words, there was no material before the trial court to show that the mandatory provisions which were required to be followed for taking samples, were actually followed or not. The trial court was justified in holding that when the mandatory provisions are not proved to have been followed, the respondents were entitled to an order of

discharge, since no charge could be framed before the trial court. In above view of the matter, the order of discharge cannot be treated to be illegal and perverse. Therefore, the trial court was justified in passing the order of discharge and their being no illegality shown to have been committed by the trial court, there is no substance in the present appeal and therefore, it requires to be dismissed. A point was raised as to whether an appeal would lie again on an order of discharge under Section 245 of the said Code. However, when there is no merit at all in the matter in question, it is not necessary to deal with and decide the said issue. However, otherwise, even if the appeal would be treated to be a revision, then also the result would be the same.

13. For the foregoing reasons, this appeal is ordered to be dismissed. The judgment and order of the trial court are confirmed.

(D. P. Buch, J.)

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